

§ 2306a. Cost or pricing data: truth in negotiations

(a) REQUIRED COST OR PRICING DATA AND CERTIFICATION.—(1) The head of an agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after December 5, 1990, the price of the contract to the United States is expected to exceed \$500,000; and

(ii) in the case of a prime contract entered into on or before December 5, 1990, the price of the contract to the United States is expected to exceed \$100,000.

(B) The contractor for a prime contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed \$500,000;

(ii) in the case of a change or modification made after December 5, 1991, to a prime contract that was entered into on or before December 5, 1990, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed \$500,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed \$100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and—

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed \$500,000;

(ii) in the case of a subcontract entered into after December 5, 1991, under a prime contract that was entered into on or before December 5, 1990, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed \$500,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed \$100,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed \$500,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph

(C)(iii), the price adjustment is expected to exceed \$100,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted—

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under that paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before December 5, 1990, the head of the agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

(b) EXCEPTIONS.—

(1) IN GENERAL.—Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

- (i) adequate price competition; or
- (ii) prices set by law or regulation;

(B) for the acquisition of a commercial item; or

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(3) NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL ITEMS.—(A) The exception in paragraph (1)(B) does not apply to cost or pricing data on noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than the amount specified in subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7), or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.

(B) In this paragraph, the term “noncommercial modification”, with respect to a commercial item, means a modification of such item that is not a modification described in section 4(12)(C)(i)¹ of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(C)(i)).

(C) Nothing in subparagraph (A) shall be construed—

(i) to limit the applicability of the exception in subparagraph (A) or (C) of paragraph (1) to cost or pricing data on a noncommercial modification of a commercial item; or

(ii) to require the submission of cost or pricing data on any aspect of an acquisition of a commercial item other than the cost and pricing of noncommercial modifications of such item.

(c) COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—

(1) AUTHORITY TO REQUIRE SUBMISSION.—Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the

procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) EXCEPTION.—The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

(3) DELEGATION OF AUTHORITY PROHIBITED.—The head of a procuring activity may not delegate functions under this paragraph.

(d) SUBMISSION OF OTHER INFORMATION.—

(1) AUTHORITY TO REQUIRE SUBMISSION.—When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.

(2) LIMITATIONS ON AUTHORITY.—The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial items.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(e) PRICE REDUCTIONS FOR DEFECTIVE COST OR PRICING DATA.—(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon be-

¹ See References in Text note below.

tween the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that—

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost and pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2).

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if—

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if—

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United

States before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(f) **INTEREST AND PENALTIES FOR CERTAIN OVERPAYMENTS.**—(1) If the United States makes an overpayment to a contractor under a contract subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States—

(A) for interest on the amount of such overpayment, to be computed—

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(g) **RIGHT OF UNITED STATES TO EXAMINE CONTRACTOR RECORDS.**—For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, the head of an agency shall have the authority provided by section 2313(a)(2) of this title.

(h) **DEFINITIONS.**—In this section:

(1) **COST OR PRICING DATA.**—The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) **SUBCONTRACT.**—The term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(3) **COMMERCIAL ITEM.**—The term “commercial item” has the meaning provided such term in section 103 of title 41.

(Added Pub. L. 99-500, §101(c) [title X, §952(a)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-166, and Pub. L. 99-591, §101(c) [title X, §952(a)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-166; Pub. L. 99-661, div. A, title IX, formerly title IV, §952(a), Nov. 14, 1986, 100 Stat. 3945, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 100-180, div. A, title VIII, §804(a), (b),

Dec. 4, 1987, 101 Stat. 1125; Pub. L. 101-510, div. A, title VIII, § 803(a)(1), (d), Nov. 5, 1990, 104 Stat. 1589, 1590; Pub. L. 102-25, title VII, § 701(b), (f)(8), Apr. 6, 1991, 105 Stat. 113, 115; Pub. L. 102-190, div. A, title VIII, § 804(a)-(c)(1), title X, § 1061(a)(9), Dec. 5, 1991, 105 Stat. 1415, 1416, 1472; Pub. L. 103-355, title I, §§ 1201-1209, Oct. 13, 1994, 108 Stat. 3273-3277; Pub. L. 104-106, div. D, title XLII, § 4201(a), title XLIII, § 4321(a)(2), (b)(7), Feb. 10, 1996, 110 Stat. 649, 671, 672; Pub. L. 104-201, div. A, title X, § 1074(a)(12), Sept. 23, 1996, 110 Stat. 2659; Pub. L. 105-85, div. A, title X, § 1073(a)(46), Nov. 18, 1997, 111 Stat. 1902; Pub. L. 105-261, div. A, title VIII, §§ 805(a), 808(a), Oct. 17, 1998, 112 Stat. 2083, 2085; Pub. L. 108-375, div. A, title VIII, § 818(a), Oct. 28, 2004, 118 Stat. 2015; Pub. L. 110-181, div. A, title VIII, § 814, Jan. 28, 2008, 122 Stat. 222; Pub. L. 111-350, § 5(b)(15), Jan. 4, 2011, 124 Stat. 3843.)

REFERENCES IN TEXT

Section 4(12)(C)(i) of the Office of Federal Procurement Policy Act, referred to in subsec. (b)(3)(B), means section 4(12)(C)(i) of Pub. L. 93-400, which was classified to section 403(12)(C)(i) of former Title 41, Public Contracts, and was repealed and restated as section 103(3)(A) of Title 41, Public Contracts, by Pub. L. 111-350, §§ 3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855.

Section 6621 of the Internal Revenue Code of 1986, referred to in subsec. (f)(1)(A)(ii), is classified to section 6621 of Title 26, Internal Revenue Code.

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500. Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 added identical sections.

AMENDMENTS

2011—Subsec. (h)(3). Pub. L. 111-350 substituted “section 103 of title 41” for “section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))”.

2008—Subsec. (b)(3)(A). Pub. L. 110-181 substituted “the amount specified in subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7),” for “\$500,000” and inserted “(at the time of contract award)” after “total price of the contract”.

2004—Subsec. (b)(3). Pub. L. 108-375 added par. (3).

1998—Subsec. (a)(5). Pub. L. 105-261, § 805(a), amended par. (5) generally. Prior to amendment, par. (5) read as follows: “For purposes of paragraph (1)(C), a contractor or subcontractor granted a waiver under subsection (b)(1)(C) shall be considered as having been required to make available cost or pricing data under this section.”

Subsec. (d)(1). Pub. L. 105-261, § 808(a), substituted “the contracting officer shall require that the data submitted” for “the data submitted shall”.

1997—Subsec. (a)(5). Pub. L. 105-85 substituted “subsection (b)(1)(C)” for “subsection (b)(1)(B)”.

1996—Subsec. (b). Pub. L. 104-106, § 4321(a)(2), made technical correction to directory language of Pub. L. 103-355, § 1202(a). See 1994 Amendment note below.

Pub. L. 104-106, § 4201(a)(1), amended subsec. (b) generally, revising and restating as pars. (1) and (2) the provisions of former pars. (1) and (2) and striking out par. (3).

Subsec. (c). Pub. L. 104-106, § 4201(a)(1), amended subsec. (c) generally, revising and restating as subsec. (c) the provisions of former subsec. (c)(1).

Subsec. (d). Pub. L. 104-106, § 4321(b)(7)(A), which directed amendment of subsec. (d)(2)(A)(ii), by inserting “to” after “The information referred”, could not be executed because subsec. (d)(2)(A) did not contain a cl. (ii) or the language “The information referred” subsequent to amendment by Pub. L. 104-106, § 4201(a)(1). See below.

Pub. L. 104-106, § 4201(a)(1), amended subsec. (d) generally, revising and restating as pars. (1) and (2) provi-

sions of former subsecs. (c)(2) and (d)(2), (4) and striking out provisions of former subsec. (d)(1), (3) relating to procurements based on adequate price competition and authority to audit.

Subsec. (e)(4)(B)(ii). Pub. L. 104-106, § 4321(b)(7)(B), struck out second comma after “parties”.

Subsec. (h). Pub. L. 104-106, § 4201(a)(2), redesignated subsec. (i) as (h) and struck out former subsec. (h) which read as follows: “REQUIRED REGULATIONS.—The Federal Acquisition Regulation shall contain provisions concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) (as adjusted pursuant to paragraph (7) of such subsection). Such information, at a minimum, shall include appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.”

Subsec. (h)(3). Pub. L. 104-201 inserted “(41 U.S.C. 403(12))” before period at end.

Subsec. (i). Pub. L. 104-106, § 4201(a)(2)(B), redesignated subsec. (i) as (h).

Subsec. (i)(3). Pub. L. 104-106, § 4321(b)(7)(C), which directed amendment of subsec. (i)(3) by inserting “(41 U.S.C. 403(12))” before period at end, could not be executed because section did not contain a subsec. (i) subsequent to the amendment by Pub. L. 104-106, § 4201(a)(2)(B), redesignating subsec. (i) as (h). See above.

1994—Subsec. (a)(1)(A)(i). Pub. L. 103-355, § 1201(a)(1), struck out “and before January 1, 1996,” after “December 5, 1990,”.

Subsec. (a)(1)(A)(ii). Pub. L. 103-355, § 1201(a)(2), struck out “or after December 31, 1995,” after “December 5, 1990,”.

Subsec. (a)(5). Pub. L. 103-355, § 1202(b), substituted “subsection (b)(1)(B)” for “subsection (b)(2)”.

Subsec. (a)(6). Pub. L. 103-355, § 1201(c), struck out subpar. (A) designation and subpar. (B) which read as follows: “The head of an agency is not required to modify a contract under subparagraph (A) if that head of an agency determines that the submission of cost or pricing data with respect to that contract should be required under subsection (c).”

Subsec. (a)(7). Pub. L. 103-355, § 1201(b), added par. (7).

Subsec. (b). Pub. L. 103-355, § 1202(a), as amended by Pub. L. 104-106, § 4321(a)(2), amended heading and text of subsec. (b) generally. Prior to amendment, text read as follows: “This section need not be applied to a contract or subcontract—

“(1) for which the price agreed upon is based on—

“(A) adequate price competition;

“(B) established catalog or market prices of commercial items sold in substantial quantities to the general public; or

“(C) prices set by law or regulation; or

“(2) in an exceptional case when the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.”

Subsec. (c). Pub. L. 103-355, § 1203, amended heading and text of subsec. (c) generally. Prior to amendment, text read as follows: “When cost or pricing data are not required to be submitted by subsection (a), such data may nevertheless be required to be submitted by the head of the agency if the head of the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract. In any case in which the head of the agency requires such data to be submitted under this subsection, the head of the agency shall document in writing the reasons for such requirement.”

Subsec. (d). Pub. L. 103-355, § 1204, added subsec. (d) and redesignated former subsec. (d) as (e).

Subsec. (e). Pub. L. 103-355, §1204(1), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(4)(A)(ii), (B)(ii). Pub. L. 103-355, §1207, inserted “or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties,” after “(or price of the modification)”.

Subsec. (f). Pub. L. 103-355, §1204(1), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(1). Pub. L. 103-355, §1209, struck out “with the Department of Defense” before “subject to this section” in introductory provisions.

Subsec. (g). Pub. L. 103-355, §1205, added subsec. (g) and struck out heading and text of former subsec. (g). Text read as follows:

“(1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting through any authorized representative of the head of the agency who is an employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to—

- “(A) the proposal for the contract or subcontract;
- “(B) the discussions conducted on the proposal;
- “(C) pricing of the contract or subcontract; or
- “(D) performance of the contract or subcontract.

“(2) The right of the head of an agency under paragraph (1) shall expire three years after final payment under the contract or subcontract.

“(3) In this subsection, the term ‘records’ includes books, documents, and other data.”

Pub. L. 103-355, §1204(1), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (i).

Subsec. (h). Pub. L. 103-355, §1206, added subsec. (h).

Subsec. (i). Pub. L. 103-355, §1208, amended heading and text of subsec. (i) generally. Prior to amendment, text read as follows: “In this section, the term ‘cost or pricing data’ means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.”

Pub. L. 103-355, §1204(1), redesignated subsec. (g) as (i).

1991—Subsec. (a)(1)(A). Pub. L. 102-190, §804(a), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of the contract if the price of the contract to the United States is expected to exceed \$500,000 or, in the case of a contract to be awarded after December 31, 1995, \$100,000.”

Subsec. (a)(1)(B). Pub. L. 102-190, §804(a), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: “The contractor for a contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if the price adjustment is expected to exceed the dollar amount applicable under subparagraph (A) to that contract (or such lesser amount as may be prescribed by the head of the agency).”

Pub. L. 102-25, §701(b)(1), substituted “the dollar amount applicable under subparagraph (A) to that contract” for “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to a contract to be made after December 31, 1995, \$100,000”.

Subsec. (a)(1)(C). Pub. L. 102-190, §804(a), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: “An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if—

“(i) the price of the subcontract is expected to exceed the dollar amount applicable under subpara-

graph (A) to the prime contract of that subcontract; and

“(ii) the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section.”

Subsec. (a)(1)(C)(i). Pub. L. 102-25, §701(b)(2), substituted “the dollar amount applicable under subparagraph (A) to the prime contract of that subcontract” for “\$500,000 or, in the case of a subcontract to be awarded after December 31, 1995, \$100,000”.

Subsec. (a)(1)(D). Pub. L. 102-190, §804(a), amended subpar. (D) generally. Prior to amendment, subpar. (D) read as follows: “The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if the price adjustment is expected to exceed the dollar amount applicable under subparagraph (A) to the prime contract of that subcontract (or such lesser amount as may be prescribed by the head of the agency).”

Pub. L. 102-25, §701(b)(3), substituted “the dollar amount applicable under subparagraph (A) to the prime contract of that subcontract” for “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to be made after December 31, 1995, \$100,000”.

Subsec. (a)(5). Pub. L. 102-190, §804(c)(1), substituted “paragraph (1)(C)” for “paragraph (1)(C)(ii)”.

Subsec. (a)(6). Pub. L. 102-190, §804(b), added par. (6).

Subsec. (e)(1)(A)(i). Pub. L. 102-25, §701(f)(8), which directed the substitution of “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”, could not be executed because “Internal Revenue Code of 1954” does not appear.

Subsec. (e)(1)(A)(ii). Pub. L. 102-190, §1061(a)(9), substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”.

1990—Subsec. (a)(1)(A). Pub. L. 101-510, §803(a)(1)(A), substituted “\$500,000 or, in the case of a contract to be awarded after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (a)(1)(B). Pub. L. 101-510, §803(a)(1)(B), substituted “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to a contract to be made after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (a)(1)(C)(i). Pub. L. 101-510, §803(a)(1)(C), substituted “\$500,000 or, in the case of a subcontract to be awarded after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (a)(1)(D). Pub. L. 101-510, §803(a)(1)(D), substituted “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to be made after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (c). Pub. L. 101-510, §803(d), inserted at end “In any case in which the head of the agency requires such data to be submitted under this subsection, the head of the agency shall document in writing the reasons for such requirement.”

1987—Subsec. (a)(5). Pub. L. 100-180, §804(b)(1), substituted “a waiver under subsection (b)(2)” for “such a waiver”, and struck out first sentence authorizing head of an agency to waive requirement under this subsection for contractor, subcontractor, or offeror to submit cost or pricing data.

Subsec. (e)(2). Pub. L. 100-180, §804(b)(2), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Except as provided under subsection (d), the liability of a contractor under this subsection shall not be affected by the contractor’s refusal to submit a certification under subsection (a)(2) with respect to the cost or pricing data involved.”

Subsec. (g). Pub. L. 100-180, §804(a), amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows: “In this section, the term ‘cost or pricing data’ means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotia-

tions significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.”

EFFECTIVE DATE OF 2004 AMENDMENT

Pub. L. 108-375, div. A, title VIII, §818(b), Oct. 28, 2004, 118 Stat. 2016, as amended by Pub. L. 109-364, div. A, title X, §1071(g)(11), Oct. 17, 2006, 120 Stat. 2403, provided that: “Paragraph (3) of subsection (b) of section 2306a of title 10, United States Code (as added by subsection (a)), shall take effect on June 1, 2005, and shall apply with respect to offers submitted, and to modifications of contracts or subcontracts made, on or after that date.”

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by sections 4201(a) and 4321(b)(7) of Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of this title.

Section 4321(a) of Pub. L. 104-106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103-355 as enacted.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 803(a)(2) of Pub. L. 101-510, as amended by Pub. L. 102-25, title VII, §704(a)(4), Apr. 6, 1991, 105 Stat. 118, provided that the amendments to this section by Pub. L. 101-510 would apply to contracts entered into after Dec. 5, 1990, subcontracts under such contracts, and modifications or changes to such contracts and subcontracts, prior to repeal by Pub. L. 102-190, div. A, title VIII, §804(c)(2), Dec. 5, 1991, 105 Stat. 1416.

EFFECTIVE DATE OF 1987 AMENDMENT

Section 804(c) of Pub. L. 100-180 provided that:

“(1) Subsection (a) [amending this section] shall apply to any contract, or modification of a contract, entered into after the end of the 30-day period beginning on the date of the enactment of this Act [Dec. 4, 1987].

“(2) The amendments made by subsection (b) [amending this section] shall apply with respect to contracts, or modifications of contracts, entered into after the end of the 120-day period beginning on October 18, 1986.”

EFFECTIVE DATE OF 1986 AMENDMENT

Section 101(c) [title X, §952(d)] of Pub. L. 99-500 and Pub. L. 99-591, and section 952(d) of title IX, formerly title IV, of Pub. L. 99-661, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273, provided that:

“(1) Except as provided in paragraph (2), section 2306a of title 10, United States Code (as added by subsection (a)), and the amendment and repeal made by subsection (b) [amending section 2306 of this title and repealing a provision set out as a note under section 2304 of this title], shall apply with respect to contracts or modifications on contracts entered into after the end of the 120-day period beginning on the date of the enactment of this Act [Oct. 18, 1986].

“(2) Subsection (e) of such section shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.”

REGULATIONS

Section 803(c) of Pub. L. 101-510, directed Secretary of Defense to prescribe regulations identifying type of procurements for which contracting officers should consider requiring submission of certified cost or pricing data under subsec. (c) of this section, and also directed Secretary to prescribe regulations concerning types of information that offerors had to submit for contracting officer to consider in determining whether

price of procurement to Government was fair and reasonable when certified cost or pricing data were not required to be submitted under this section because price of procurement to the United States was not expected to exceed \$500,000, such information, at minimum, to include appropriate information on prices at which such offeror had previously sold same or similar products, with such regulations to be prescribed not later than six months after Nov. 5, 1990, prior to repeal by Pub. L. 103-355, title I, §1210, Oct. 13, 1994, 108 Stat. 3277.

PRICE TREND ANALYSIS FOR SUPPLIES AND EQUIPMENT PURCHASED BY THE DEPARTMENT OF DEFENSE

Pub. L. 111-383, div. A, title VIII, §892, Jan. 7, 2011, 124 Stat. 4310, provided that:

“(a) PRICE TREND ANALYSIS PROCEDURES.—

“(1) IN GENERAL.—The Secretary of Defense shall develop and implement procedures that, to the maximum extent practicable, provide for the collection and analysis of information on price trends for covered supplies and equipment purchased by the Department of Defense. The procedures shall include an automated process for identifying categories of covered supplies and equipment described in paragraph (2) that have experienced significant escalation in prices.

“(2) CATEGORY OF COVERED SUPPLIES AND EQUIPMENT.—A category of covered supplies and equipment referred to in paragraph (1) consists of covered supplies and equipment that have the same National Stock Number, are in a single Federal Supply Group or Federal Supply Class, are provided by a single contractor, or are otherwise logically grouped for the purpose of analyzing information on price trends.

“(3) REQUIREMENT TO EXAMINE CAUSES OF ESCALATION.—An analysis conducted pursuant to paragraph (1) shall include, for any category in which significant escalation in prices is identified, a more detailed examination of the causes of escalation for such prices within the category and whether such price escalation is consistent across the Department of Defense.

“(4) REQUIREMENT TO ADDRESS UNJUSTIFIED ESCALATION.—The head of a Defense Agency or the Secretary of a military department shall take appropriate action to address any unjustified escalation in prices being paid for items procured by that agency or military department as identified in an analysis conducted pursuant to paragraph (1).

“(b) ANNUAL REPORT.—Not later than April 1 of each year, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the analyses of price trends that were conducted for categories of covered supplies and equipment during the preceding fiscal year under the procedures implemented pursuant to paragraph (1). The report shall include a description of the actions taken to identify and address any unjustified price escalation for the categories of items.

“(c) DEFINITIONS.—In this section:

“(1) SUPPLIES AND EQUIPMENT.—The term ‘supplies and equipment’ means items classified as supplies and equipment under the Federal Supply Classification System.

“(2) COVERED SUPPLIES AND EQUIPMENT.—The term ‘covered supplies and equipment’ means all supplies and equipment purchased by the Department of Defense. The term does not include major weapon systems but does include individual parts and components purchased as spare or replenishment parts for such weapon systems.

“(d) SUNSET DATE.—This section shall not be in effect on and after April 1, 2015.”

GRANTS OF EXCEPTIONS TO COST OR PRICING DATA CERTIFICATION REQUIREMENTS AND WAIVERS OF COST ACCOUNTING STANDARDS

Pub. L. 107-314, div. A, title VIII, §817, Dec. 2, 2002, 116 Stat. 2610, as amended by Pub. L. 112-81, div. A, title VIII, §809(a), Dec. 31, 2011, 125 Stat. 1490, provided that:

“(a) GUIDANCE FOR EXCEPTIONS IN EXCEPTIONAL CIRCUMSTANCES.—Not later than 60 days after the date of the enactment of this Act [Dec. 2, 2002], the Secretary of Defense shall issue guidance on the circumstances under which it is appropriate to grant an exceptional case exception or waiver with respect to certified cost and pricing data and cost accounting standards.

“(b) DETERMINATION REQUIRED FOR EXCEPTIONAL CASE EXCEPTION OR WAIVER.—The guidance shall, at a minimum, include a limitation that a grant of an exceptional case exception or waiver is appropriate with respect to a contract, subcontract, or (in the case of submission of certified cost and pricing data) modification only upon a determination that—

“(1) the property or services cannot reasonably be obtained under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver;

“(2) the price can be determined to be fair and reasonable without the submission of certified cost and pricing data or the application of cost accounting standards, as the case may be; and

“(3) there are demonstrated benefits to granting the exception or waiver.

“(c) APPLICABILITY OF NEW GUIDANCE.—The guidance issued under subsection (a) shall apply to each exceptional case exception or waiver that is granted on or after the date on which the guidance is issued.

“(d) ANNUAL REPORT ON BOTH COMMERCIAL ITEM AND EXCEPTIONAL CASE EXCEPTIONS AND WAIVERS.—(1) THE SECRETARY OF DEFENSE SHALL TRANSMIT TO THE CONGRESSIONAL DEFENSE COMMITTEES [COMMITTEES ON ARMED SERVICES AND APPROPRIATIONS OF THE SENATE AND THE HOUSE OF REPRESENTATIVES] PROMPTLY AFTER THE END OF EACH FISCAL YEAR A REPORT ON COMMERCIAL ITEM EXCEPTIONS, AND EXCEPTIONAL CASE EXCEPTIONS AND WAIVERS, DESCRIBED IN PARAGRAPH (2) THAT WERE GRANTED DURING THAT FISCAL YEAR.

“(2) The report for a fiscal year shall include—

“(A) with respect to any commercial item exception granted in the case of a contract, subcontract, or contract or subcontract modification that is expected to have a price of \$15,000,000 or more, an explanation of the basis for the determination that the products or services to be purchased are commercial items, including an identification of the specific steps taken to ensure price reasonableness;

“(B) with respect to any exceptional case exception or waiver granted in the case of a contract or subcontract that is expected to have a value of \$15,000,000 or more, an explanation of the basis for the determination described in subsection (b), including an identification of the specific steps taken to ensure that the price was fair and reasonable; and

“(C) with respect to any determination pursuant to section 2304a(d)(3)(D) of title 10, United States Code, that because of exceptional circumstances it is necessary in the public interest to award a task or delivery order contract with an estimated value in excess of \$100,000,000 to a single source, an explanation of the basis for the determination.

“(e) DEFINITIONS.—In this section:

“(1) The term ‘exceptional case exception or waiver’ means either of the following:

“(A) An exception pursuant to section 2306a(b)(1)(C) of title 10, United States Code, relating to submission of certified cost and pricing data.

“(B) A waiver pursuant to section 26(f)(5)(B) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 422(f)(5)(B)) [now 41 U.S.C. 1502(b)(3)(B)], relating to the applicability of cost accounting standards to contracts and subcontracts.

“(2) The term ‘commercial item exception’ means an exception pursuant to section 2306a(b)(1)(B) of title 10, United States Code, relating to submission of certified cost and pricing data.”

DEFENSE COMMERCIAL PRICING MANAGEMENT IMPROVEMENT

Pub. L. 105-261, div. A, title VIII, § 803, Oct. 17, 1998, 112 Stat. 2081, as amended by Pub. L. 106-65, div. A, title

X, § 1067(3), Oct. 5, 1999, 113 Stat. 774; Pub. L. 107-314, div. A, title VIII, § 823, Dec. 2, 2002, 116 Stat. 2615; Pub. L. 109-364, div. A, title VIII, § 819, Oct. 17, 2006, 120 Stat. 2330, provided that:

“(a) MODIFICATION OF PRICING REGULATIONS FOR CERTAIN COMMERCIAL ITEMS EXEMPT FROM COST OR PRICING DATA CERTIFICATION REQUIREMENTS.—(1) The Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 405, 421) [see 41 U.S.C. 1121, 1303] shall be revised to clarify the procedures and methods to be used for determining the reasonableness of prices of exempt commercial items (as defined in subsection (d)).

“(2) The regulations shall, at a minimum, provide specific guidance on—

“(A) the appropriate application and precedence of such price analysis tools as catalog-based pricing, market-based pricing, historical pricing, parametric pricing, and value analysis;

“(B) the circumstances under which contracting officers should require offerors of exempt commercial items to provide—

“(i) information on prices at which the offeror has previously sold the same or similar items; or

“(ii) other information other than certified cost or pricing data;

“(C) the role and responsibility of Department of Defense support organizations in procedures for determining price reasonableness; and

“(D) the meaning and appropriate application of the term ‘purposes other than governmental purposes’ in section 4(12) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 403(12)) [see 41 U.S.C. 103].

“(3) This subsection shall cease to be effective 1 year after the date on which final regulations prescribed pursuant to paragraph (1) take effect.

“(b) UNIFIED MANAGEMENT OF PROCUREMENT OF EXEMPT COMMERCIAL ITEMS.—The Secretary of Defense shall develop and implement procedures to ensure that, whenever appropriate, a single item manager or contracting officer is responsible for negotiating and entering into all contracts from a single contractor for the procurement of exempt commercial items or for the procurement of items in a category of exempt commercial items.

“(c) COMMERCIAL PRICE TREND ANALYSIS.—(1) The Secretary of Defense shall develop and implement procedures that, to the maximum extent that is practicable and consistent with the efficient operation of the Department of Defense, provide for the collection and analysis of information on price trends for categories of exempt commercial items described in paragraph (2).

“(2) A category of exempt commercial items referred to in paragraph (1) consists of exempt commercial items—

“(A) that are in a single Federal Supply Group or Federal Supply Class, are provided by a single contractor, or are otherwise logically grouped for the purpose of analyzing information on price trends; and

“(B) for which there is a potential for the price paid to be significantly higher (on a percentage basis) than the prices previously paid in procurements of the same or similar items for the Department of Defense, as determined by the head of the procuring Department of Defense agency or the Secretary of the procuring military department on the basis of criteria prescribed by the Secretary of Defense.

“(3) The head of a Department of Defense agency or the Secretary of a military department shall take appropriate action to address any unreasonable escalation in prices being paid for items procured by that agency or military department as identified in an analysis conducted pursuant to paragraph (1).

“(4) Not later than April 1 of each of fiscal years 2000 through 2009, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Rep-

representatives a report on the analyses of price trends that were conducted by the Secretary of each military department and the Director of the Defense Logistics Agency for categories of exempt commercial items during the preceding fiscal year under the procedures prescribed pursuant to paragraph (1). The report shall include a description of the actions taken by each Secretary and the Director to identify and address any unreasonable price escalation for the categories of items.

“(d) EXEMPT COMMERCIAL ITEMS DEFINED.—For the purposes of this section, the term ‘exempt commercial item’ means a commercial item that is exempt under subsection (b)(1)(B) of section 2306a of title 10, United States Code, or subsection (b)(1)(B) of section 304A of the Federal Property and Administrative Services Act of 1949 ([former] 41 U.S.C. 254b) [now 41 U.S.C. 3503(a)(2)], from the requirements for submission of certified cost or pricing data under that section.”

REVIEW BY INSPECTOR GENERAL

Section 803(b) of Pub. L. 101-510 provided that (1) after increase in threshold for submission of cost or pricing data under subsec. (a) of this section, as amended by section 803(a) of Pub. L. 101-510, had been in effect for three years, Inspector General of Department of Defense was to conduct review of effects of increase in threshold, (2) that such review was to address whether increasing threshold improved acquisition process in terms of reduced paperwork, financial or other savings to government, an increase in number of contractors participating in defense contracting process, and adequacy of information available to contracting officers in cases in which certified cost or pricing data were not required under this section, (3) that Inspector General was to submit to Secretary of Defense a report on review conducted under paragraph (1), with Secretary of Defense required to submit such report to Congress, along with appropriate comments, upon completion of report (and comments) but not later than date on which President submitted budget to Congress pursuant to section 1105 of Title 31, Money and Finance, for fiscal year 1996, prior to repeal by Pub. L. 103-355, title I, § 1210, Oct. 13, 1994, 108 Stat. 3277.

§ 2306b. Multiyear contracts: acquisition of property

(a) IN GENERAL.—To the extent that funds are otherwise available for obligation, the head of an agency may enter into multiyear contracts for the purchase of property whenever the head of that agency finds each of the following:

(1) That the use of such a contract will result in substantial savings of the total anticipated costs of carrying out the program through annual contracts.

(2) That the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities.

(3) That there is a reasonable expectation that throughout the contemplated contract period the head of the agency will request funding for the contract at the level required to avoid contract cancellation.

(4) That there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive.

(5) That the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(6) In the case of a purchase by the Department of Defense, that the use of such a con-

tract will promote the national security of the United States.

(7) In the case of a contract in an amount equal to or greater than \$500,000,000, that the conditions required by subparagraphs (C) through (F) of paragraph (1) of subsection (i) will be met, in accordance with the Secretary's certification and determination under such subsection, by such contract.

(b) REGULATIONS.—(1) Each official named in paragraph (2) shall prescribe acquisition regulations for the agency or agencies under the jurisdiction of such official to promote the use of multiyear contracting as authorized by subsection (a) in a manner that will allow the most efficient use of multiyear contracting.

(2)(A) The Secretary of Defense shall prescribe the regulations applicable to the Department of Defense.

(B) The Secretary of Homeland Security shall prescribe the regulations applicable to the Coast Guard, except that the regulations prescribed by the Secretary of Defense shall apply to the Coast Guard when it is operating as a service in the Navy.

(C) The Administrator of the National Aeronautics and Space Administration shall prescribe the regulations applicable to the National Aeronautics and Space Administration.

(c) CONTRACT CANCELLATIONS.—The regulations may provide for cancellation provisions in multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. The cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

(d) PARTICIPATION BY SUBCONTRACTORS, VENDORS, AND SUPPLIERS.—In order to broaden the defense industrial base, the regulations shall provide that, to the extent practicable—

(1) multiyear contracting under subsection (a) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(2) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(e) PROTECTION OF EXISTING AUTHORITY.—The regulations shall provide that, to the extent practicable, the administration of this section, and of the regulations prescribed under this section, shall not be carried out in a manner to preclude or curtail the existing ability of an agency—

(1) to provide for competition in the production of items to be delivered under such a contract; or

(2) to provide for termination of a prime contract the performance of which is deficient with respect to cost, quality, or schedule.

(f) CANCELLATION OR TERMINATION FOR INSUFFICIENT FUNDING.—In the event funds are not made available for the continuation of a contract